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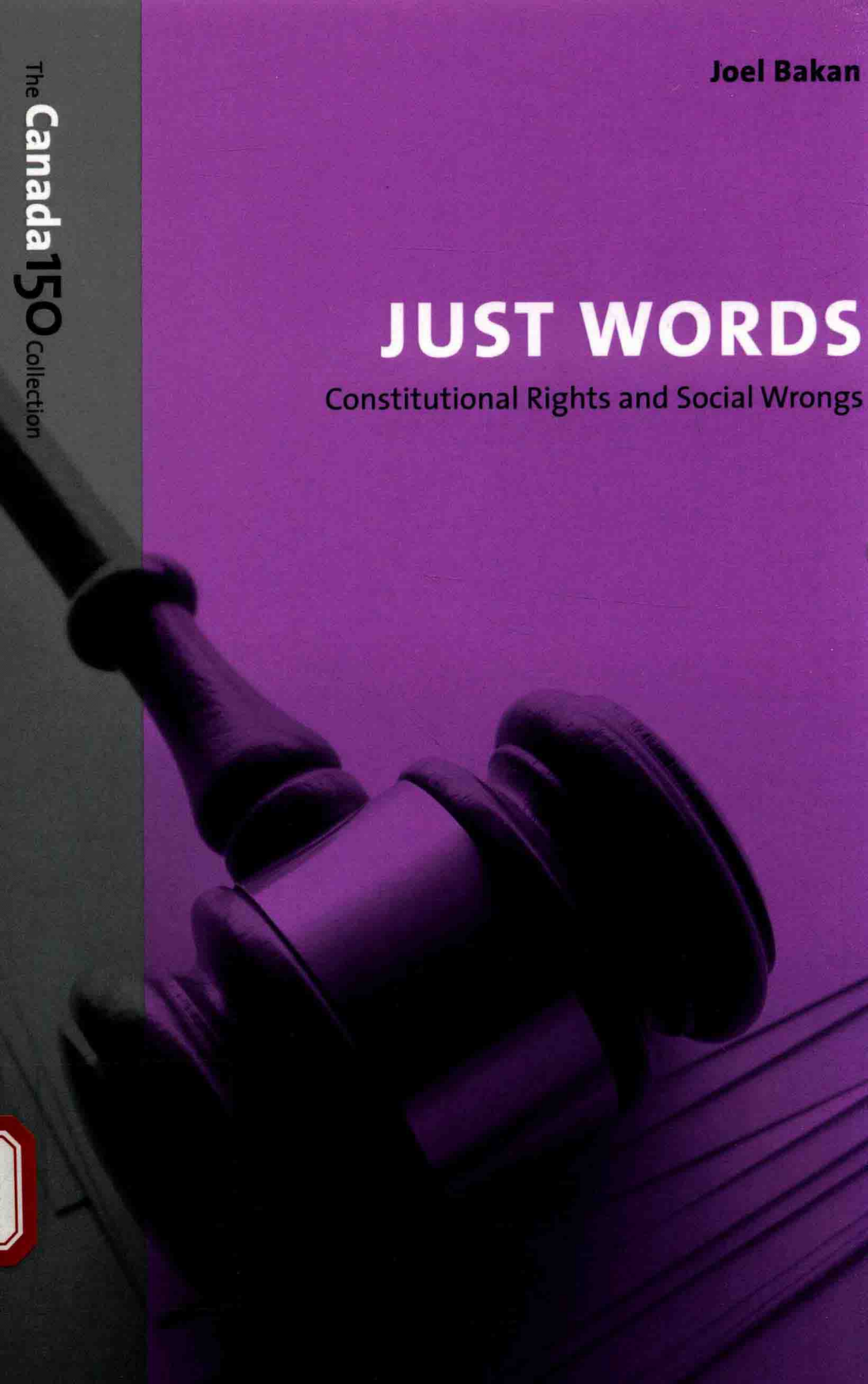
Joel Bakan

JUST WORDS

Constitutional Rights and Social Wrongs



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Just Words: Constitutional Rights and Social Wrongs

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JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS

The Canadian Charter of Rights is composed of words that describe the foundations of a just society: equality, freedom, and democracy. These words of justice have inspired struggles for civil rights, self-determination, trade unionism, the right to vote, and social welfare. Why is it, then, that fifteen years after the entrenchment of the Charter, social injustice remains pervasive in Canada?

Joel Bakan explains why the Charter has failed to promote social justice, and why it may even impede it. He argues that the Charter's fine-sounding words of justice are 'just words.' The principles of equality, freedom, and democracy are interpreted and implemented by a fundamentally conservative institution – the legal system – within social and economic conditions that systematically frustrate their full realization.

Sophisticated in its analyses but clearly written and accessible, *Just Words* is cutting-edge commentary by one of Canada's rising intellectuals.

JOEL BAKAN is a professor of law at the University of British Columbia.

For my parents,
Rita and Paul Bakan

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Above all, the person who has made the writing of this book possible is Marlee Kline. Words cannot express my gratitude to her for loving, caring for, and believing in me; for inspiring and challenging me intellectually; for reading and re-reading the countless drafts of this manuscript, always providing me with thoughtful and insightful comments and suggestions for improving it; and for her constant encouragement, especially when the dark cloud of self-doubt hovered over me.

To my parents, Rita and Paul Bakan, to whom this book is dedicated, I am grateful for the gifts of intellect, idealism, and compassion, and for teaching me to challenge convention, think critically, and care about the deeper things in life. They have been my most important and influential teachers. The animating idea of this book – that scepticism about the present is part of the struggle for a better future – is something I learned from them. I thank them as well for reading earlier drafts of this manuscript and for helping me improve it. Most of all, I thank them, as well as my sister and brother, Laura Bakan and Michael Bakan, for their constant love, support, and encouragement.

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I have attempted to write a book that will help people understand constitutional rights. To illustrate my arguments, I analyse the provisions of Canada's Charter of Rights and Freedoms, 1982, that guarantee rights of equality (section 15) and freedom (sections 2 and 7). Some key issues in constitutional law – Quebec, First Nations, language rights, and criminal procedure – though discussed at various points in the book, are not comprehensively dealt with. I believe that these issues require books of their own, and I judged at an early stage in the manuscript's development that a chapter or two examining each would not have done them justice. At the same time, I hope that the book's approach to analysing constitutional rights will be useful to those grappling with these important matters.

This book is the product of my thinking about constitutional rights over the last ten years. Chapters 1, 3–7, and 10 have not been previously published, though they draw on and develop ideas, occasionally reproducing actual passages, from papers that I published between 1989 and 1995 in the *Canadian Bar Review*, *McGill Law Journal*, *Public Law*, *University of Toronto Law Faculty's Legal Theory Workshop Series*, *University of Toronto Law Journal*, and *Constitutional Politics*, a collection of essays edited by Duncan Cameron and Miriam Smith. Chapter 2 is an abridged, updated, and amended version of an article that first appeared in the *Osgoode Hall Law Journal*. Chapter 8, which I originally wrote with Michael Smith, first appeared in *Social and Legal Studies* and is also included in *Charting the Consequences* (1997 forthcoming), a collection of essays edited by David Schneiderman and Kate Sutherland. Chapter 9 is based primarily on a piece that first appeared in *Social Justice and the Constitution*, a collection of essays that I edited with David Schneiderman, and its introductory paragraphs are drawn from the Introduction to that collection, which I wrote with David Schneiderman.

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JUST WORDS

1

Introduction

One cannot combat the real existing world by merely combating the phrases of this world.
Karl Marx (1981, 41)[1]

The Canadian Charter of Rights and Freedoms, 1982, is composed of words that describe the foundations of a just society: equality, freedom, and democracy. These words of justice, or just words, state the highest ideals of progressive social movements and have inspired struggles for social justice throughout history. People have fought for civil rights, self-determination, trade unionism, the right to vote, and social equality in their name. The Charter has become a symbol of hope for social justice advocates because of its powerful words. A decade and a half after its constitutional entrenchment, however, social injustice remains pervasive in Canada. Why has the Charter failed to protect or advance social justice in Canada? Recasting the 'living tree' metaphor so often used to describe it, I argue that the Charter is only paper, dead tree, with ink on it. Its fine-sounding words of justice are only words, just words. They can do nothing on their own, and the social processes that give them effect tend to thwart whatever progressive promise they might hold. The Charter's potentially radical and liberatory principles of equality, freedom, and democracy are administered by a fundamentally conservative institution – the legal system – and operate in social conditions that routinely undermine their realization. That is why, I argue below, the Charter has done little to promote social justice in Canada despite its just words. The present chapter briefly describes my arguments, locates them within the literature on rights and on the Charter, and explains the book's normative foundations.

This book is about the relationship between Charter law and the social forces that shape its interpretation and effects. I explore that relationship by analysing the Supreme Court of Canada's Charter jurisprudence and asking why the court has

done what it has under the Charter, what the real effects are of its decisions, and what it and other courts are likely to do with the Charter in the future.[2] Charter law, I argue, is constituted by discourses about law, rights, and society that are *ideological* – a term I use to indicate that they are anchored in and help sustain specific patterns of social relations and political order (Eagleton 1991, 8). To begin with, law, particularly constitutional law, is represented in judicial decisions and mainstream scholarship on the Charter as separate from politics – as a search for objective truth, a matter of trust in impartial processes, or some combination of the two. This is the basis – a tenuous one, I argue in part I – for claims that judicial review of parliamentary institutions under the Charter is principled, as opposed to political, and therefore legitimate, even though judges are not democratically representative or accountable.

Part II examines the ideological conception of rights that informs Charter law. Courts tend to rely on liberal rights discourse when interpreting the Charter, presenting government regulation as the primary threat to human liberty and equality, and individuals as abstract equals unaffected by structural forms of domination and exploitation. These ideas and images (discussed at length in chapter 3) are firmly anchored in Charter law and contribute substantially to the Charter's incapacity to redress most areas of social injustice. The Charter's equality rights, for example, are largely ineffective because the causes and symptoms of social inequality generally lie beyond their judicially determined scope (chapter 3); the right to freedom of expression protects people only from discrete governmental restrictions on their speech and thus does not affect the social processes that restrict people's ability to communicate effectively (chapter 4); and freedom of association cannot protect workers from unemployment and the increasing mobility of capital, which are the real threats to their rights to organize, bargain collectively, and strike (chapter 5). I argue further that social injustice is actually worsened by the Charter in some areas. There is an unfortunate symbiosis between the anti-government ideology of neo-liberal right-wing politics and the deregulatory form of Charter rights. Individuals, groups, and corporations are able to use the Charter to avoid legislative restrictions designed to prevent them from harming and exploiting others – a point I illustrate in chapter 6 by examining Charter victories of business corporations and individuals accused of sexual assault and hate crimes.

I discuss again the liberal form of rights in part IV (chapters 8 and 9) to help explain the effects of rights discourse in political contexts beyond the courts. Chapter 8 analyses the uses and effects of rights discourse, around issues of women's equality, First Nations, and Quebec, during the lead-up to the referendum on the Charlottetown Accord.[3] Chapter 9 criticizes the argument that the Charter's failure to achieve social justice can be remedied by entrenching another Charter, a 'social charter,' which explicitly protects social (positive) rights.

Part III (chapter 7) examines the effects of ideological discourses about society on Charter adjudication. I argue that judges, because of their education, socialization, and the processes through which they are appointed, tend to stay within the bounds of conservative discourses, about work, family, sexuality, race, and other social phenomena, when deciding Charter cases. Because claims for social justice under the Charter often must draw on oppositional and alternative ideas, this conservative disposition is a limit, further to that of rights' liberal form, on the progressive potential of Charter litigation – a point that I illustrate by examining how members of the court have dealt with Charter challenges to legislation regulating labour relations, commercial advertising, and benefits for gays and lesbians.

There are important differences between the arguments of this book and those of other progressive scholars of the Charter. To begin with, I analyse Charter law from an external perspective, focusing on its social and ideological dimensions. As social theorists of law have long insisted, strictly internal legal analysis cannot lead to understanding of how law actually works.[4] Weber (1954, 11–12), one of the first modern sociologists of law, noted that law can be studied from two different perspectives – the 'juridical point of view' and the perspective of 'sociological economics.' The former is concerned with 'the correct meaning of propositions the content of which constitutes an order supposedly determinative for the conduct of a defined group of persons'; the latter, with 'the interconnections of human activities as they actually take place.' According to Weber, the juridical point of view (which I call the 'internal perspective') is deficient because it focuses only on normative questions within the legal system and thus generates knowledge about law that 'has nothing to do with the world of real economic content' (12). Understanding law fully, in his view, requires analysing it from a standpoint outside the legal system.

Following Weber on this point, I am interested in the social and ideological dimensions of Charter law, not questions about its validity or soundness as judged by the internal conventions of legal method. This does not mean that the internal perspective on law is irrelevant; rejecting it as a standpoint for studying law does not deny its relevance as an object of inquiry (Hunt 1993; Sargent 1991). Scholars must intelligibly construe law from the perspective of those who create and use it, before they can identify and analyse its social and ideological dimensions. In the following chapters I thus examine in detail the contents and conventions of Charter law as a necessary step before analysing, from an external perspective, their limits, contradictions, effects, and determinants.

The emphasis on external analysis distinguishes my work from most other Charter scholarship, the bulk of which assumes an internal perspective and considers primarily normative questions: what should courts do? what should the law be? how should this or that legal provision or decision be interpreted?[5] Progressive

internal analysis usually presumes that the purpose of the Charter is to advance social justice, and then it interprets and evaluates Charter law from this perspective. Analysts argue, for example, that Charter rights guarantee adequate standards of social and economic welfare (Jackman 1988; 1993), legal aid (Mossman 1988; Hughes 1995), shelter (Parkdale Community Legal Services 1987) and workers' rights (Beatty 1987; 1991). At a more philosophical level, some scholars argue that rights litigation has progressive potential because it is principled, as opposed to political (Beatty 1987; Dyzenhaus 1989), while others claim that it can be made progressive by rooting out its conservative foundations through interpretation (Minow 1990; Trakman 1991; 1994; Nedelsky 1993) (I examine both schools in chapter 2).There is thus a wealth of insight into what the Charter should or might do, but little about 'where we *already* are and ... what we *already* do' (Fischl 1993, 783).

I do not want to deny, however, that internal analysis of the Charter and law is intellectually rigorous. E.P. Thompson has noted, for example, that 'Blackstone's *Commentaries* [a paradigmatic example of internal legal analysis] represent an intellectual exercise far more rigorous than could have come from an apologist's pen' (1975, 263). Thompson is right about the intellectual rigour. He is wrong, however, to imply that apologetics cannot take an intellectually rigorous form. Internal legal thought is rigorous, and elegant on occasion, but it implicitly defends a method that presumes, rather than questions, law's autonomy from politics and society.[6] Most legal scholars acknowledge the gap between the ideal of law and its practice, expose and correct mistakes and inconsistencies in legal doctrine, criticize corruption and incompetence, and see a place for values and policies, sometimes even progressive or radical ones, in legal reasoning.[7] All of this, however, only reinforces a more general faith in law by implying the plausibility of aspiring to achieve its ideal form. Law is presumed to be, '[like] religion,' as Marx characterized Hegel's understanding of the state, 'beyond the limitation of the profane world' (Marx 1967, 225).[8]

The work in this book differs as well from that of other external Charter analysts.[9] In particular, I reject the argument put forward by some (but certainly not all) of these scholars that the Charter and rights discourse are inherently flawed as forms of progressive politics. Progressive scholars offer two versions of this argument. First, they criticize constitutional rights litigation for being 'inherently antidemocratic' because it enables judges to override decisions of elected representatives (Mandel 1994, 70; see also Ely 1980; Monahan 1987).[10] The flaw in this hypothesis, as I argue more fully in chapter 2, is its presumption that decisions of legislatures or governments are necessarily more democratic than those of courts. Because of unequal political resources, the existence of multiple parties, and numerous imperfections in extant democratic institutions, electoral processes can-

not always produce governments, and certainly not particular policies, that have majority support. Theoretically, then, a Charter decision can actually serve the principle of majoritarianism by striking down legislation not supported by a majority. Arguably, the court's decision to strike down unpopular criminal prohibitions on abortions is an example of this (*Morgentaler* 1988). A Charter decision might also support majoritarianism by making elections fairer and thus improving the representativeness of governments, as in *Dixon* (1989), where a court ordered the redrawing of electoral riding boundaries. Moreover, majoritarianism can itself be blatantly inegalitarian and thus undemocratic. Though it often serves egalitarian ends in capitalist systems because it grants political power to the majority as a hedge against the private economic power of the minority, majority rule can also reinforce domination. History is replete with examples of minorities, defined by race, religion, sexuality, disability, and other social and personal characteristics, being oppressed, exploited, and excluded from key areas of economic and social life by majorities. Unjust treatment of minorities by a majority is anathema to the participatory ideals underlying notions of democratic citizenship, and constitutional rights litigation is one strategy that might be used against such injustices (more about which in chapter 4).

In theory, then, formally countermajoritarian restraints on representative institutions – such as those imposed by the Charter – might advance democracy and equality. I am not arguing that the Charter is likely to have such effects. As I demonstrate below, in current social and political conditions, the Charter does not further democratic and egalitarian values, except in narrow and exceptional circumstances (namely, where majority power has been used to entrench oppression), and, even then, not substantially; moreover, it often serves to undermine these values. Despite the imperfections of representative institutions in Canada, and the numerous examples of abusive and oppressive exercises of governmental and legislative power (against First Nations, workers, women, immigrants, lesbians and gays, and others), the historical record, at least of the period since the Second World War, arguably demonstrates that they have wider progressive potential and capacity than courts in many areas of social policy.[11] I base this assessment, however, on what legislatures and courts have actually done, not on a comparison of their ideal forms. In contrast, anti-democracy critiques of constitutional rights tend to emphasize comparisons of institutional forms, without considering how varying social and political circumstances might shape the relative effects of legislative and judicial actions in different times, places, and contexts. The resulting presumption against constitutional rights can both exaggerate the democratic potential of representative institutions and categorically deny the possibility that, in some circumstances, constitutional rights can advance democratic values.[12]

Next, I want to distinguish my approach from the claim, characteristic of much

work in the critical legal studies school, that rights discourse is inherently regressive because it imposes an 'impoverished and partial notion of social life' on society (Hutchinson 1995, 25). Hutchinson is one of the leading advocates of this view in relation to the Charter (see more generally Gabel 1984). Rights discourse, he argues, is individualistic and formalistic and 'has hijacked citizenship and made it subservient to its own civic ambitions' (Hutchinson 1995, 214). The project for progressive politics is to replace rights discourse with new discourses, described variously as 'democratic conversation' and 'radical' or 'unmodified' democracy (207, 223), which would serve to reconstitute community through people's 'experience of interpersonal relations and its [the community's] ties' (187). Within his self-consciously 'postmodern critique' (225), Hutchinson constructs and reconstructs discourse in a social vacuum, free of material constraints, thus implying that its qualities are intrinsic rather than a product of social forces. He evaluates the limits of rights discourse, and the emancipatory potentials of other modes of discourse, in the abstract, apart from the specific social forces that shape their nature and effects and the actual opportunities and capacities of those who use them in political struggle. Political discourses thus appear as autonomous, having profound effects on social relations but being curiously unaffected by them. Hutchinson offers no systematic analysis of the multiple social and economic forces that undermine democratic citizenship today, nor of how these shape the nature and power of various political discourses.

Hutchinson's inattention to the effects of underlying social and economic forces on discursive practice is not a mere oversight, but rather a reflection of the deep scepticism about claims to understand the empirical dimensions of history and society that is currently fashionable in postmodern social theory. This is a major distinction between my work and his (and other postmodern rights theorists). Explaining the 'reality' of constitutional rights is this book's goal. My aim is to understand the wider social processes that shape, sustain, and determine the effects and nature of discursive practices under the Charter. Though postmodern theorists are correct in their view that unmediated access to final truths about the world is impossible – we can, after all, know and explain the world only through language, a social construct – that does not preclude our understanding 'how things work, how our world is put together, how things happen to us as they do' (D. Smith 1990, 34–5). I agree with Hunt (1992) that the process of gaining knowledge about the world is one of '*successive approximation* to reality' (58); we can try to come 'to grips with empirical reality in order to engage politically in its transformation' (62), while still avoiding the dangers and pretensions of positivist and empiricist social science (see also Barrett 1991, 167; Eagleton 1991, 1–32).

A fundamental feature of empirical reality in Canada today is the fact that we

live in a capitalist system of social relations. Class analysis – examination of the relationships and processes of economic production, particularly property and ownership, that establish unequal patterns of power and dependence among people (Meikins Wood 1995) – is thus necessary (albeit not sufficient) for critical theory and practice (Fudge and Glasbeek 1992b; Harvey 1993; Frankel 1994), as should become apparent in the chapters that follow, particularly 3–6, 9, and 10. Postmodern analysts, such as Hutchinson (1995), tend to be sceptical of class analysis, partly because it posits a 'reality' beyond discursive practice (174; see also Laclau and Mouffe 1985, 58). Such scepticism may explain Hutchinson's failure to consider fully the inevitable constraints of capitalist social relations on discursive strategies surrounding struggles for social change.

My differences with Mandel, Hutchinson, and other external critics of the Charter who take similar approaches, as well as with the progressive internal scholars discussed above, are primarily analytical; we share a general conception of social justice (described below) but differ on how to assess the role of constitutional rights in the struggle to achieve it. My concern is with the tendency in their analyses, whether in favour of the Charter or against it, to pay insufficient attention to the constraining influences of economic, social, and political conditions on the operation and effects of the Charter. That is what I try to avoid here. I argue throughout this book that the Charter, and particularly its failure to advance social justice, must be explained in relation to the specific conditions in which it operates. All political institutions, including the Charter and rights, are necessarily constrained in their operation by the wider social system that they are established to govern. That is why it is necessary to be sceptical of both Charter optimism and pessimism when they are based on allegedly essential features of the Charter or rights. The emancipatory and egalitarian potential of the Charter ultimately depends on the social and historical circumstances surrounding its use (D. Herman 1994; Brown 1995, 100).

It is necessary for me to explain the normative foundations of the book. To this point, I have been using value-laden terms such as 'social justice' and 'progressive' to describe the standards against which I am evaluating the Charter's operation. In analysing Charter law from outside the internal norms of legal discourse I do not mean to imply that the analysis lacks a normative dimension. On the contrary, the book's central question – 'Why has the Charter failed to advance a progressive vision of social justice?' – presumes a normative standpoint. Its basic elements are co-terminous with the Charter's 'just words' – equality, freedom, and democracy – but defined much more broadly than the limits of Charter discourse would allow.

Equality entails elimination of major disparities in people's material resources, well-being, opportunities, and political and social power, and an absence of eco-